STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 15, 2011
v	No. 296217 Wayne Circuit Court
CHOYA ANTHONY TINSLEY, Defendant-Appellant.	LC No. 06-014042-FH

Before: SAWYER, P.J., and JANSEN and DONOFRIO, JJ.

PER CURIAM.

Following a jury trial in 2007, defendant was convicted of felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to a two-year term of imprisonment for the felony-firearm conviction, to be followed by two years' probation for the felonious assault conviction. He appeals as of right. We affirm defendant's convictions and sentences, but remand for correction of the presentence report.

Defendant's convictions in this case arise from an October 1, 2006, incident in which defendant and an accomplice went to the home of Charles Mosley, brandished handguns, and threatened Mosley for harassing defendant's sister (Mosley's former girlfriend). Defendant admitted going to Mosley's home, but claimed that his associate, whom defendant identified as Dardell Jennings, was the only person who threatened Mosley with a gun. Defendant was separately charged in a second case with first-degree premeditated murder, MCL 750.316(1)(a), felon in possession of a firearm, MCL 750.224f, and felony-firearm in connection with the October 20, 2006, shooting death of Mosley. The two cases were consolidated for trial. In August 2007, a jury convicted defendant of the felonious assault and felony-firearm charges in this case, but was unable to reach a verdict in the second case. Accordingly, the trial court declared a mistrial in the second case.

In 2008, defendant was retried in the second case and convicted of the charged offenses. This Court affirmed those convictions in *People v Tinsley*, unpublished opinion per curiam of the Court of Appeals, issued November 18, 2010 (Docket No. 287470), lv den ___ Mich ___ (June 28, 2011). Although defendant had previously timely requested the appointment of appellate counsel to pursue an appeal of his 2007 convictions in the first (felonious assault) case, counsel was never appointed due to a clerical error, which was not discovered until after defendant filed

his appeal in the murder case. Counsel was thereafter appointed and defendant now challenges his 2007 convictions in this appeal.

I. REBUTTAL EVIDENCE

Defendant first argues that the trial court abused its discretion when it allowed the prosecutor to present rebuttal testimony to contradict his claim that Jennings was the person who accompanied him to Mosley's home. Defendant also argues that the trial court erred in denying his request to present responsive surrebuttal evidence.

The admissibility of rebuttal evidence is generally within the discretion of the trial court and the court's decision "will not be disturbed absent a clear abuse of discretion." *People v Figgures*, 451 Mich 390, 398; 547 NW2d 673 (1996). Likewise, this Court reviews a trial court's decision to allow surrebuttal evidence for an abuse of discretion. *United States v Moody*, 903 F2d 321, 330 (CA 5, 1990); *People v Solak*, 146 Mich App 659, 675; 382 NW2d 495 (1985). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008).

After the first incident on October 1, 2006, Mosley's girlfriend, Darlene Russell, gave a description of defendant's associate to the police, but could not identify him by name. At trial, on direct examination by the prosecutor, Russell provided a description of the person who was with defendant. The following exchange then occurred:

> *Q.* Okay. Do you know someone by the name of Chivas Dooley? Do you know someone personally by the name Chivas Dooley?
>
> *A.* No, ma'am.
>
> *Q.* And if Mr. Dooley were to be described as six three, would that be approximately the height range of this individual?
>
> *A.* Possibly.
>
> *Q.* And—
>
> *The court*: That calls for speculation. I'm not going to allow it. I don't see there's a relevance.
>
> *The prosecutor*: Well, Judge, I can tie it up later in defense counsel's case. That's why I'm asking her about this.
>
> *The court*: Well, then tie it up—well, no, I'm not going to allow it now.

Subsequently, defendant testified that Jennings was the person who accompanied him to Mosley's house on October 1. Defendant further testified that it was Jennings who produced a gun and threatened to "drop" Mosley. During the period between Russell's trial testimony during the prosecution's case and the close of the defense case, Russell observed Dooley outside the courtroom, recognized him as the person who was with defendant on October 1, and learned

his name. The prosecutor thereafter called Russell as a rebuttal witness to rebut defendant's testimony that Jennings was the person who was with him at Mosley's house on October 1. During her rebuttal testimony, Russell was shown photographs of Dooley and Jennings, and she identified Dooley as the man who was with defendant. Russell also stated that she had seen the same man at the preliminary examination and pointed him out to Sergeant Gary Diaz, but she did not know his name at that time. Following Russell's rebuttal testimony, the trial court denied defendant's request to present Sergeant Diaz and Dooley to "sur-rebut what it is that the prosecution presented in rebuttal."

In *Figgures*, 451 Mich at 399, our Supreme Court explained the proper purpose and scope of rebuttal evidence:

> Rebuttal evidence is admissible to "contradict, repel, explain or disprove evidence produced by the other party and tending directly to weaken or impeach the same." [*People v Delano*, 318 Mich 557, 570; 28 NW2d 909 (1947)], quoting *People v Utler*, 217 Mich 74, 83; 185 NW 830 (1921). See *People v Kelly*, 423 Mich 261, 281; 378 NW2d 365 (1985). The question whether rebuttal is proper depends on what proofs the defendant introduced and not on merely what the defendant testified about on cross-examination.
>
> . . . [T]he test of whether rebuttal evidence was properly admitted is not whether the evidence could have been offered in the prosecutor's case in chief, but, rather, whether the evidence is properly responsive to evidence introduced or a theory developed by the defendant. . . . As long as evidence is responsive to material presented by the defense, it is properly classified as rebuttal, even if it overlaps evidence admitted in the prosecutor's case in chief.

Here, defendant testified that the person who accompanied him to Mosley's house was Jennings, and that Jennings was the person who threatened Mosley with a gun. Defendant further testified that Jennings did not respond to defendant's requests that Jennings turn himself in to the police to clear defendant of the pending charges. Russell's testimony that the person she observed with defendant on October 1 was not Jennings, but rather was Dooley (who was defendant's alibi witness for the October 20 shooting incident), was proper rebuttal testimony because it was responsive to and directly contradicted defendant's testimony concerning the identity of the person who accompanied him to Mosley's house on October 1. Contrary to what defendant argues, it is immaterial whether the evidence could have been offered in the prosecutor's case in chief. *Figgures*, 451 Mich at 399. Regardless, the evidence established that Russell was not able to identify defendant's associate by name when she originally testified. She explained that it was not until after she testified that she saw the person again in court and learned his name at that time. The trial court did not abuse its discretion in allowing Russell's rebuttal testimony.

Further, the trial court's decision to preclude surrebuttal testimony did not fall outside the range of reasonable and principled outcomes. *Yost*, 278 Mich App at 379. A trial court may refuse to admit surrebuttal evidence if the defendant has already presented evidence on the matter, and further proofs are not necessary to impeach the rebuttal evidence. See *Solak*, 146 Mich App at 675; see also *Moody*, 903 F2d at 331. Here, defendant had already testified that

Jennings was the person who accompanied him to Mosley's house. Russell's rebuttal testimony was properly admitted to contradict defendant's identity of the person as Jennings, and defense counsel was permitted to thoroughly cross-examine Russell on the matter. At that point, there was evidence presented by both sides concerning the identity of defendant's associate. The trial court did not abuse its discretion in concluding that additional evidence was not necessary on that issue.

II. PRIOR CONVICTION

Defendant next argues that the trial court abused its discretion by allowing the prosecutor to impeach his credibility with a 1993 conviction for receiving or concealing stolen property, contrary to MRE 609(c). This Court reviews a trial court's decision to allow impeachment by evidence of a prior conviction for an abuse of discretion. *People v Coleman*, 210 Mich App 1, 6; 532 NW2d 885 (1995). A prior conviction may be used to impeach a witness's credibility if the conviction satisfies the criteria set forth in MRE 609. *People v Cross*, 202 Mich App 138, 146; 508 NW2d 144 (1993). Plaintiff concedes, and we agree, that the prior conviction was not admissible under this rule because "a period of more than ten years ha[d] elapsed since the date of the conviction or of the release of [defendant] from the confinement imposed for that conviction." MRE 609(c). Thus, the trial court abused its discretion by admitting the conviction to impeach defendant's credibility. We conclude, however, that the error was harmless.

"The erroneous admission of evidence of a prior conviction is harmless error where reasonable jurors would find the defendant guilty beyond a reasonable doubt even if evidence of the prior conviction had been suppressed." *Coleman*, 210 Mich App at 7; see also *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999) (a preserved nonconstitutional error is not grounds for reversal unless it is more probable than not that the error was outcome determinative). The evidence of defendant's 1993 conviction for receiving or concealing stolen property was of comparatively minor significance considering the totality of the admissible evidence against him. Russell unequivocally identified defendant as the person who came to Mosley's house and pointed a gun at Mosley. Defendant's presence was established by defendant's own testimony. Defendant admitted going to Mosley's residence unannounced to discuss matters related to Mosley's former relationship with defendant's sister. Immediately after the incident, Mosley and Russell both told the police that defendant had come to Mosley's residence, brandished a gun, and threatened Mosley. Mosley's daughter also testified that Mosley called her after the incident and stated that defendant had pulled a gun on him and was going to kill him. Defendant's 14-year-old conviction was mentioned briefly during this lengthy 14-day trial. Defendant, himself, minimized the prior conviction as involving a mere case of "joyriding." After examining the nature of the evidentiary error in light of the weight and strength of the untainted evidence, it is not more probable than not that the error affected the outcome. Accordingly, reversal is not required.

III. ACCURACY OF THE PRESENTENCE REPORT

Defendant next argues that the trial court failed to correct inaccurate information in his presentence report. We agree.

At sentencing, either party may challenge the accuracy or relevancy of any information contained in the presentence report. MCL 771.14(6); MCR 6.425(E)(1)(b); *People v Lloyd*, 284 Mich App 703, 705-706; 774 NW2d 347 (2009). If the court is presented with a challenge to the factual accuracy of information, it has a duty to resolve the challenge. *People v Uphaus (On Remand)*, 278 Mich App 174, 182; 748 NW2d 899 (2008). At sentencing, defendant identified several factual inaccuracies in his presentence report. He asserted that the presentence report inaccurately stated (1) that his conviction for felony-firearm was by plea instead of by jury; (2) that he was only entitled to 295 days of sentence credit, instead of 319 days[1]; (3) that attorney fees should be assessed, although he had retained counsel; (4) his home address; and (5) that he "retrieved a BSR from his waistband." The trial court agreed with defendant's challenges and indicated that the presentence report would be corrected. However, the corrections are not reflected in the copy of the presentence report that was forwarded to this Court. The prosecutor concedes, and we agree, that defendant is entitled to a corrected presentence report. Accordingly, we remand this case to the trial court and direct that court to make the corrections to the presentence report that it agreed to make at sentencing. The court shall also forward a corrected copy of the presentence report to the Department of Corrections.

IV. DEFENDANT'S STANDARD 4 BRIEF

Defendant raises several additional issues in a pro se supplemental brief filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4, none of which have merit.

A. PROSECUTOR'S CONDUCT

Defendant argues that he is entitled to a new trial because the prosecutor improperly elicited testimony from a police officer that placed defendant's habitual offender status before the jury. Defendant observes that the challenged testimony does not appear in the transcript that was produced for this appeal, but further argues that the failure to transcribe the objectionable testimony is further reason to grant him relief on appeal. We disagree. This Court reviews preserved claims of prosecutorial misconduct case by case, examining the challenged remarks in context to determine whether the defendant received a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995); *People v Rodriguez*, 251 Mich App 10, 29-30; 650 NW2d 96 (2002).

The transcript produced for this appeal reflects the following exchange during the prosecutor's direction examination of Sergeant Todd Eby:

> *Q.* The [arrest] warrant was signed October 6th, of 2006, is that correct?
>
> *A.* Yes.
>
> *Q.* Were you aware of the charge on that warrant on October 26th, 2006?

[1] The judgment of sentence reflects an award of 319 days of sentence credit.

A. Yes.

Q. And what charge was that?

Defense counsel: Objection. That's why—

The prosecutor: (Interposing) Judge, it goes—

Defense counsel: (Continuing)—we're here. I'm sorry, I didn't finish. That's why we're here, because there's been a charge. And—

The court: (Interposing) I'll allow it. I'll allow it. Go ahead.

Q. What charges were filed on that day?

A. The—

The court: (Interposing) Wait.

(*Additional colloquy reported by court reporter; not ordered transcribed*)

According to defendant, the colloquy that was not transcribed included Sergeant Eby's response that defendant was charged with felonious assault, felony-firearm, and *habitual offender, third offense*. Defendant further contends that in response to Sergeant Eby's testimony, the trial court

> angrily stopped the proceedings and abruptly removed the jury from the courtroom. The trial court admonished the prosecutor and Sgt. Eby for the blatant introduction of highly prejudicial information and when the trial resumed, the jury was told that Sgt. Eby's answers to the prosecutor's questions were not to be taken as evidence.

Contrary to what defendant argues, the unavailability of a portion of a transcript does not require reversal of a defendant's convictions. Rather, this Court must determine whether the missing portion of the transcript so impedes the defendant's right to appeal that a new trial must be ordered. *People v Audison*, 126 Mich App 829, 834-835; 338 NW2d 235 (1983). If the surviving record is sufficient to allow evaluation of the issues on appeal, the defendant's right is satisfied. *Id.* at 835. The defendant bears the burden of showing prejudice because of the missing portion of the transcript. *Bransford v Brown*, 806 F2d 83, 86 (CA 6, 1986).

Here, accepting for purposes of this appeal that defendant accurately represents the untranscribed portion of the transcript, defendant has failed to demonstrate that appellate relief is warranted. According to defendant, after the officer's objectionable response, the trial court immediately instructed the jury not to consider the officer's answer as evidence. It is well established that jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). The record also discloses that, in its final instructions, the trial court instructed the jury as follows:

> [D]uring the trial I have excluded evidence that was offered or stricken testimony that was heard. Do not consider those things in deciding this case. Make your decision only on the evidence that I let in and nothing else.

The court also reminded the jury of its oath to return a verdict based only on the evidence and the court's instructions on the law. The trial court's instructions were sufficient to dispel any possible prejudice. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001). Accordingly, defendant is not entitled to relief with respect to this issue.

B. MOTION TO DISMISS – *BRADY* VIOLATION

Defendant also argues that the trial court erred in denying his motion to dismiss the case for failure to procure and produce the audio recording of Russell's 911 call after the shooting, contrary to *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963). This Court reviews a trial court's ruling on a motion to dismiss for an abuse of discretion. *People v Herndon*, 246 Mich App 371, 389; 633 NW2d 376 (2001)

A criminal defendant has a due process right of access to certain information possessed by the prosecution if that evidence might lead a jury to entertain a reasonable doubt about the defendant's guilt. *People v Lester*, 232 Mich App 262, 280; 591 NW2d 267 (1998), citing *Brady*, 373 US 83. "Impeachment evidence as well as exculpatory evidence falls within the *Brady* rule because, if disclosed and used effectively, such evidence 'may make the difference between conviction and acquittal."' *Lester*, 232 Mich App at 281, quoting *United States v Bagley*, 473 US 667, 676; 105 S Ct 3375; 87 L Ed 2d 481 (1985). To establish a *Brady* violation, a defendant must prove: (1) that the state possessed evidence favorable to the defendant; (2) that the defendant did not possess the evidence and could not have obtained it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. *Id.* at 281-282.

In this case, the prosecution never possessed the 911 recording, and the recording was not available for trial because it had been purged from the system. The trial court conducted an evidentiary hearing on the issue and found that there was no bad faith on the part of the police in failing to timely and properly preserve the recording. More significant, however, is that there is no indication that the absence of the 911 recording could have affected the outcome of the case. Defendant sought the recording for the purpose of showing that Russell stated that "there was only one gunman." However, Russell testified that she advised the 911 operator that two men with guns had just left Mosley's house, and that the 911 operator did not ask her any questions. In addition, the responding police officer testified that immediately after the incident, Russell and Mosley both stated that defendant and his accomplice had guns and pointed them at Mosley. Therefore, there is nothing to support defendant's claim that the 911 recording contained exculpatory evidence. Finally, to the extent that defendant sought the recording to generally attack Russell's credibility, the trial court instructed the jury that it could infer that the missing 911 recording would have been unfavorable to the prosecution. In light of the evidence and the trial court's instruction, there is no reasonable probability that the 911 recording, had it been preserved and produced, would have affected the outcome of the trial. Accordingly, the trial court did not err in denying defendant's motion to dismiss.

C. DOUBLE JEOPARDY

Defendant lastly argues that double jeopardy principles barred him from being retried in the murder case arising from the October 20, 2006, shooting. This issue is not properly before this Court. This appeal is limited to the felonious assault case arising from the October 1, 2006, incident at Mosley's home. Defendant's convictions and sentences in the separate murder case were the subject of a separate appeal in Docket No. 287470, and defendant may not collaterally attack those convictions in this appeal. *People v Ingram*, 439 Mich 288, 291 n 1; 484 NW2d 241 (1992); *People v Howard*, 212 Mich App 366, 369; 538 NW2d 44 (1995). For this reason, we decline to address defendant's double jeopardy claim.

Affirmed in part and remanded for correction of the presentence report in accordance with this opinion. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Kathleen Jansen
/s/ Pat M. Donofrio